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No. 89-46

In The

Supreme Court Of The United States

October Term, 1989

Patricia M. Wood, et al.,

Petitioners,

v.

General Motors Corporation,

Respondent.

General Motors Corporation's Supplemental Brief Concerning the Brief of the United States as Amicus Curiae

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The Solicitor General's "Brief of the United States As Amicus Curiae" ("S.G. Br.") concludes that "review by this Court [of the case] is unwarranted." (*Id.* at 16) Petitioners' "Supplemental Brief In Response To Brief of the United States as Amicus Curiae" ("Pet. Supp. Br.") nevertheless argues that the Solicitor General's Brief really supports review here. Petitioners therefore ignore the Solicitor General's conclusion, and mischaracterizes what he says along the way.

Thus, Petitioners argue that "[a]ccording to the Solicitor General," 15 U.S.C. § 1397(c) (the so-called savings clause) "preserves 'any liability under common law' . . . ." (Pet. Supp. Br., pp. 2-3) But, in fact, the Solicitor General advises that § 1397(c) "does not preserve tort claims that would obstruct that [the Secretary's purpose here] or any other purpose of federal law." (S.G. Br. p. 16) The Solicitor General based that statement of law on a long and unbroken line of authority. (*Id.*) The First Circuit here (and the Tenth and Eleventh Circuits in *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), petition for certiorari pending, No. 89-279, and *Taylor v. General Motors Corp.*, 875 F.2d

816 (11th Cir. 1989), petition for certiorari pending, No. 89-852), simply followed that authority. (General Motors Corporation's Brief In Opposition to Petition for Writ of Certiorari ["GM Opp. Br."], pp. 25-26) Petitioners continue to disregard it.

Next, petitioners argue that the "Solicitor General concedes that Congress *did not intend* federal motor vehicle safety standards to preempt common law claims." (Pet. Supp. Br., p. 8; emphasis in original) But, in fact, the Solicitor General advises that Congress intended motor vehicle safety standards to preempt common law claims that "conflict with federal law or policies." The Solicitor General is also clear that current FMVSS 208 and the Secretary's policies underlying it would be "frustrated" by allowing common law airbag claims; that those claims would "drastically 'interfere[ ] with the methods by which [FMVSS 208] was designed to reach [its] goal'" (citation omitted); and that "thus [they] would be preempted by federal law." (S.G. Br., pp. 10-14)

Moreover, the Solicitor General reached those judgments even without regard to earlier versions of FMVSS 208 and the policies which underlay them; he is, understandable, concerned with current policy. But those earlier versions and policies would also be "frustrated" – and their methods "drastically" interfered with – were airbag/passive restraint claims permitted with respect to vehicles manufactured under them. The First, Tenth and Eleventh Circuits, and the huge body of lower court case law squarely on point, squarely so holds. (*See* GM Opp. Br., pp. 4-8, 16-20)

Next, petitioners argue that the "Solicitor General seriously understates the extent of the conflict that exists between the lower courts in cases involving airbags." (Pet. Supp. Br., p. 4) But the Solicitor General correctly observed that "there is no conflict among the federal circuits or the state courts of last resort"; that three federal circuit courts had held petitioners' claims preempted; and that three state appellate courts are in accord. (S.G. Br., pp. 7, 16)

Petitioners' acrobatic reach to find a "severe" conflict proves there is none. Thus, petitioners point to *Taylor*, above, but it found preemption, 875 F.2d 816; petitioners cite to *Schwartz v. Volvo*

North America Corp., 554 So. 2d 927 (Ala. 1989), but it held plaintiffs had no airbag claim as a matter of Alabama law; and petitioners note *Gingold v. Audi-NSU-Auto Union AG*, 567 A.2d 312 (Pa. Super. 1989), but it is still pending in the Pennsylvania court system, and the Solicitor General cited that lone authority, so was clearly aware of it in any event. The truth is there is virtual unanimity, not conflict, here; petitioners cannot alchemize conflict out of none. (GM Opp. Br., pp. 2, 16-20)[1]

Next, petitioners argue that the Solicitor General observed there is "no basis for the First Circuit's creation of a 'design defect exception' to 15 U.S.C. § 1397(c)." (Pet. Supp. Br., p.3) But the First Circuit created no such exception; to the contrary, it made clear that most design defect cases are unaffected by federal standards. It explained that Safety Act standards are performance standards, so "a direct conflict between a common law design standard" — on which common law design cases are based — and a Safety Act performance standard is "a rare event indeed." This case presents that rare event, in part because FMVSS 208, unique in the Safety Act, has "elements of a design standard." (GM Opp. Br., pp. 14-15; *see also* S.G. Br., p. 6 n.9) Petitioners still disregard that, and the narrowness of the First Circuit's holding.[2]

Last, Petitioners assert that the Solicitor General "agrees with [them] that the decision below (like the decisions in the other pending cases) improperly preempts state common law . . . ." (Pet.

[1] Petitioners again charge that General Motors settled *Heftel v. General Motors Corp.*, No. 89-7086 (D.C. Cir.) and *Ritt v. General Motors Corp.*, No. 88-1822 (7th Cir.) to avoid adverse decisions. (Pet. Supp. Br., p. 5) That accusation is inappropriate and misleading. In fact, General Motors pursued three Circuit Court appeals, and after it won all three, plaintiffs in the remaining Circuit Court cases settled. (GM Opp. Br., p. 20, n.14)

[2] Petitioners further argue that other Safety Act cases involving different design defects conflict with this one. (Pet. Supp. Br., p. 4) But the First Circuit had "no quarrel" with those cases, and explained why they were beside the point of this one. (GM Opp. Br., pp. 20-23) The Solicitor General also explained why: Those cases did not "involve[ ]" preemption. (S.G. Br., p. 17 n.17) Petitioners complain that the Solicitor General distinguished whether compliance with a safety standard is a defense on the merits under state law from whether a safety standard preempts a state claim under federal law. (Pet. Opp. Br., p. 11) That, petitioners say, is a "distinction[ ] without a difference." But it is, of course, a basic distinction with a fundamental difference.

Supp. Br., p. 3) That is false. While the Solicitor General takes issue with some of the First Circuit's reasoning in favor of his own, he is clear that his "preemption theory also may not lead to a result that differs from the one below." (S.G. Br., p. 17) He recognizes that his alternative views on the preemptive effect of superseded pre-1984 regulations – the only issue on which his views differ from General Motors' – does not warrant review. Petitioners themselves show why: the issue is "less and less likely to arise, as the manufacturers are moving closer and closer to all-airbag fleets." (Pet. Supp. Br., p. 7)

And as for the "other pending cases" (Pet. Supp. Br., p. 3), including *Taylor*, the Solicitor General does not address, much less take issue with, any of them,[3] let alone "agree" they were wrongly decided. They were not. A sea of well-reasoned cases is in accord with them. (GM Opp. Br., pp. 16-20) There remains no conflict, and no occasion for review here. The petition should be denied.

Dated: March 28, 1990.

Respectfully submitted,

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[3] Except, presumably, to the extent *Kitts* follows *Wood*.